

Thomson, Rogers in conjunction with the Toronto ABI Network

# Navigating the New SABS: Practical Solutions

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## CATASTROPHIC IMPAIRMENT - NEW DIRECTIONS

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Barristers and Solicitors

# CATASTROPHIC IMPAIRMENT – NEW DIRECTIONS

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...continued from my paper of September, 2009:

*“Helping to Determine if your Client is Catastrophically Impaired - The Role of the Health Care Professional”*

[http://www.thomsonrogers.com/sites/default/files/catastrophic\\_impairment\\_role\\_of\\_the\\_health\\_care\\_professional.pdf](http://www.thomsonrogers.com/sites/default/files/catastrophic_impairment_role_of_the_health_care_professional.pdf)

CHANGE IN SABS DEFINITION:

Single arm/leg amputee = CAT

FOCUS OF THIS PRESENTATION:

Mental and Behavioural Disorders

# MENTAL AND BEHAVIOURAL DISORDERS

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**Enhanced role of Health Care Professional in helping to determine mental and behavioural impairments:**

***Pastore v. Aviva*** Arbitration Decision, February 11, 2009

***Pastore v. Aviva*** Appeal Decision, December 22<sup>nd</sup>, 2009

***Fournie v. Coachman*** Arbitration Decision, February 12, 2010

# MENTAL AND BEHAVIOURAL DISORDERS:

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**QUESTION: IS THERE A ROLE FOR:**

- **The Occupational Therapist**
- **Speech Language Pathologist**
- **Physiotherapist**
- **Psychologist, and**
- **Neuropsychologist**

**in helping to evaluate whether a person has sustained a mental or behavioural disorder?**

**ANSWER: YES!**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## THE FOUR AREAS OF POTENTIAL FUNCTIONAL LIMITATION:

- **Activities of Daily Living**
- **Social Functioning**
- **Concentration**
- **Adaptation**

**See Chapter 14, Guides to the Evaluation of  
Permanent Impairment, 4<sup>th</sup> Edition**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## POSSIBLE LEVELS OF IMPAIRMENT

- **Class I – No Impairment**
- **Class II – Mild Impairment**
- **Class III – Moderate Impairment**
- **Class IV – Marked Impairment**
- **Class V – Extreme Impairment**

# MENTAL AND BEHAVIOURAL DISORDERS:

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**QUESTION: What does it take to have a  
Catastrophic Impairment:**

- **Class IV – Marked Impairment**

**“impairment levels *significantly impede* useful  
functioning”**

**Significant = more than minimal**

**Impede = hinder**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## DETERMINING LEVEL OF IMPAIRMENT:

- **History of Pre-Accident Function**
- **Activities of Daily Living (ADL)**
- **Social functioning**
- **Concentration**
- **Adaptation**

**Critical to obtain baseline of pre-accident function to determine the degree of impairment.**

- **Broad definition of activities of daily living**



# MENTAL AND BEHAVIOURAL DISORDERS:

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**ACTIVITIES OF DAILY LIVING** include, but are not limited to:

(page 317 of the AMA Guides)

- **Self Care.**
- **Personal Hygiene.**
- **Communication.**
- **Physical activity.**
- **Sensory function.**
- **Hand function.**
- **Travel function.**
- **Sexual function.**
- **Sleep function.**
- **Social and recreational activities.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## SOCIAL FUNCTIONING:

In assessing social functioning an assessor determines:

**“An individual’s capacity to interact appropriately and communicate effectively with other individuals...it is not only the number of aspects in which social functioning is impaired that is significant, but also the overall degree of interface with a particular aspect or combination of aspects.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## CONCENTRATION, PERSISTENCE AND PACE:

“Refers to the ability to sustain focused attention long enough to permit timely completion of tasks commonly found in work settings”.

# MENTAL AND BEHAVIOURAL DISORDERS:

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## DETERIORATION OR DECOMPENSATION IN WORK OR WORK-LIKE SETTINGS (Adaptation):

“Refers to repeated failure to adapt to stressful circumstances. In the face of such circumstances, the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, to decompensate and have difficulty maintaining activities of daily living, continuing social relationships and completing tasks.”

# MENTAL AND BEHAVIOURAL DISORDERS:

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**QUESTION:** In assessing Activities of Daily Living, Social Functioning, Concentration and Adaptation, do I only assess psychological functioning?

**ANSWER:** NO...

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

**Mrs. Pastore is a sixty-six year old woman, fracture of left ankle, several surgeries relating to ankle, surgery on right knee.**

**Pre-accident degenerative changes in knees, asymptomatic.**

**Whole Person Impairment of 2% for left ankle and 20% for right knee Psychological impairment 22% whole person impairment.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Arbitrator:

**“For Mrs. Pastore, the combination of physical limitations and the associated pain are intertwined...it is important to examine and consider the role of pain in relation to an individual’s functional limitations. A complete assessment must consider the effect of pain and Mrs. Pastore’s pain disorder on her activities of daily living.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Arbitrator:

**“The pain not only limits her physical abilities to do the activity but it plays a role in the feeling of loss of meaningful activities or social relationships. This loss is noted as resulting in frustration, resentment or anger, which further increases the pain.”**



# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### **CAT Assessment:**

**Ms. Jane Wong, Occupational Therapist conducted three day occupational therapy assessment.**

### **Ms. Wong concluded:**

**“There are physical and some emotional barriers that limit Ms. Pastore from functioning at her pre-accident status.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

**Occupational Therapist detailed specific physical limitations. In addition Ms. Wong noted:**

- **“Intermittent left ankle pain,**
- **Guarded knee movements due to fear of injury,**
- **Difficulty coping with pain and frustration,**
- **Difficulty sleeping,**
- **Fear of walking outside,**
- **Anxiety,**
- **Depression,**
- **Extremely low energy,**
- **Fear in a car,**
- **Strained relationship with husband and limited intimacy.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Pre-Accident Function:

**Mrs. Pastore's evidence was that before the accident she was an avid church-goer and active in related church social events, liked to play cards, bocce ball, bowling, was responsible for all housekeeping and cooking and was primary caregiver for husband who had impaired health.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Post Accident Function:

Since the accident Mrs. Pastore has been dependent upon her husband for housekeeping, personal care and mobility.

During the day she sits on the couch and watches TV. She cannot sit comfortably always and cannot sit for long periods without pain.

She has limited ability for standing and walking and reduced balance.

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Post Accident Function:

**She is only able to get around using a walker. She cannot use public transportation and cannot walk long distances alone. She cannot climb stairs except by going backwards.**

**She cannot participate in previous recreational activities or baby-sit her grandson.**

**She needs assistance with getting dressed, getting in and out of the bath tub, combing hair and cutting her nails.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

**CAT-DAC Concluded and Arbitrator agreed:**

**“Given the extent of interaction between Mrs. Pastore’s recognized physical and behaviour pain-based disorder, it is not possible to factor out the impact of any such discrete physical impairments and associated pain limitations.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

**CAT-DAC found and Arbitrator agreed:**

**“The impact of these physical, psychological and physical/psychological disorders on her daily functioning significantly impede her daily living tasks.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Arbitrator cited Chapter 14 of the AMA Guides:

**“Any limitation with respect to activities of daily living should be related to the mental disorder...” “What is assessed is not simply the number of activities that are restricted, but the overall degree of restriction or combination of restrictions.”**



# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

**Arbitrator stated:**

**“I do not interpret this as requiring a complete separation of physical and mental impairment, nor do I think it is possible when you are considering an impairment that also involves pain.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Arbitrator found:

**“The combination of physical limitations and the associated pain are intertwined. They both play an integral part in having transformed her life from being a completely self-sufficient and independent individual and caregiver to her husband to becoming almost completely dependent on him and others for her most basic personal care needs.”**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Pastore v. Aviva*

### Arbitrator found:

**“I agree with the CAT DAC conclusions that it is not possible to factor out the impact of any such discrete physical impairments and associated pain limitations, and that any impairment ratings should incorporate both on a “cumulative basis”.**

***Pastore* decision was upheld on appeal at FSCO.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## ***Marked Impairments:***

***One “Marked Impairment” is adequate to meet the definition of Catastrophic.***

***- Desbiens, McMichael, Pastore, Pastore Appeal and Fournie***

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Fournie v. Coachman*

**Mr. Fournie, age 45 sustained comminuted fractures to his left ankle when he was a cyclist and struck from behind.**

- **Required two crutches or two canes to ambulate outside the home.**
- **40% whole person impairment relating to his physical impairments.**
- **Reduction in activity level after the accident and a high self perception of pain.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Fournie v. Coachman*

- Depression, anxiety, concern about his future and a low level activity due to pain management.
- Diagnosed with major depressive disorder and post traumatic stress disorder.
- He could participate in recreation and socialization but was precluded from carrying them out adequately and in full.

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Fournie v. Coachman*

**An occupational therapist completed a three hour functional ability evaluation.**

**An insurer examination with a psychiatrist found Mr. Fournie had a pain disorder but the disorder was associated with his foot injury and not with psychological factors (which is different from the *Pastore* case where physical and psychological pain condition was “intertwined”).**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Fournie v. Coachman*

**Dr. Alvin Shapiro, clinical psychologist and Dr. Harold Merskey, psychiatrist, found that Mr. Fournie suffered a Class IV Marked Impairment in his activities of daily living, adaptation to work and social functioning.**



# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Fournie v. Coachman*

Dr. Merskey noted:

“Looking at the 4<sup>th</sup> edition of the AMA Guides, Chapter 14, page 301, I consider that the psychological disabilities, difficulty in focus, difficulty in concentration, etc., as outlined by Dr. Shapiro, [clinical psychologist] reflect a Class IV – Marked Impairment level which significantly impedes useful functioning. Domestic care, ordinary pleasures in every respect, recreation, establishment of relationships with a suitable partner, ability to travel and shop are all significantly impaired. Mobility and work are significantly impaired.”

# MENTAL AND BEHAVIOURAL DISORDERS:

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## *Fournie v. Coachman*

Arbitrator stated:

**Dr. Merskey believes that Mr. Fournie qualifies as catastrophically impaired because of pain. He did not specify which of the four aspects of functioning (ADL, Social Functioning, Concentration and Adaptation) were affected by Mr. Fournie's pain.**

**Dr. Merskey used the Pain Intensity Frequency Grid in the Guides (Chapter 15 page 310) to indicate that Mr. Fournie had "Marked" Impairments.**

# NEW DIRECTIONS:

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## PAIN INTENSITY FREQUENCY GRID:

**Marked:** The pain precludes carrying out most activities of daily living. Sleep is disrupted. Recreation and socialization are impossible. Narcotic medication or invasive procedures are required and may not result in complete pain control.

# NEW DIRECTIONS:

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## CHANGES TO CAT IMPAIRMENT ASSESSMENTS:

**New Rule 45 (2) 1. of the SABS limits assessment or examination in connection with a determination of catastrophic impairment to “a physician”.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## CAT BRAIN INJURY:

**New Rule 45 (2) 2. of the SABS creates an exception to the “physician only” rule “if the impairment” is only a “brain impairment”. In these cases, the assessment or examination “may” be conducted by a “neuropsychologist”.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## NEED FOR OT ASSESSMENT:

Based on the importance of the assessments performed by the Occupational Therapists in *Pastore* and *Fournie*, very difficult to see how an Arbitrator can decide whether “marked impairment” without an OT assessment.

# MENTAL AND BEHAVIOURAL DISORDERS:

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## NEED FOR OT ASSESSMENT CONT'D:

**Arbitrator can review whatever relevant evidence he or she chooses to help determine CAT issue. Victim may require private OT activities of daily living assessment (and others) to help get them to CAT.**

# MENTAL AND BEHAVIOURAL DISORDERS:

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## CONCLUSIONS:

*Pastore v. Aviva*

*Fournie v. Coachman*

Interpretation of “Significantly Impede Useful  
Functioning”.

Significantly does not mean “totally”.

Impede does not mean “totally prevent”



# MENTAL AND BEHAVIOURAL DISORDERS:

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## CONCLUSIONS:

**Significantly** = more than insignificant; more than *de minimus*; more than minimally.

**Example:** a 25% contribution was found by the Supreme Court of Canada in *Athey* to be “significant”.

**Impede** = obstruct, hinder, delay.

\* *Athey v. Leonati* [1996], 3 S.C.R. 458

# MENTAL AND BEHAVIOURAL DISORDERS:

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## CONCLUSIONS ABOUT EVALUATING MARKED IMPAIRMENTS:

- \* Pain and physical function are often intertwined.
- \* Determine all aspects of physical and psychological functioning before accident.
- \* Occupational therapist and other Health Care Professionals should perform situational assessments and other assessment to determine whether there are any impairments to post accident physical and psychological function.

# MENTAL AND BEHAVIOURAL DISORDERS:

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## CONCLUSIONS ABOUT EVALUATING MARKED IMPAIRMENTS:

- \* If a victim requires attendant care to perform activities of daily living may have “marked impairments”.
- \* If there has been a significant negative change in social functioning, concentration or adaptation = marked impairment.
- \* Quality of interaction in activities of daily living, social functioning, work or work-like settings as well as quantity of activities are critical to consider.
- \* 1 marked impairment = CAT



**THANK YOU!**